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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 460

WILLIAM J. CLEARY,

Petitioner,

vs.

CHICAGO TITLE AND TRUST COMPANY,
a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS AND BRIEF IN SUPPORT THEREOF.

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May It Please The Court:

The Petitioner, William J. Cleary, respectfully petitions this Honorable Court for a writ of certiorari to the Supreme Court of Illinois. In this petition the petitioner will be designated as Cleary and the respondent as the Trust Company.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The Chicago Lumber Company in 1927 purchased real property from Cleary appraised at \$185,000. Payment was to be made by \$100,000 in bonds; fifty-one per cent of the stock of the corporation, and \$10,000 in cash, (Tr. 986). The Trust Company was escrow depositary and trustee in the bonds of this corporation, receiving and transferring Cleary's property. It received a deposit of \$200,000 in bonds and two-thirds of the stock of the lumber company. The Trust Company delivered bonds to others, and Cleary has received nothing. This proceeding is a counter-claim by Cleary of a suit for \$481.80 filed against Cleary by the Trust Company for fees as escrow depositary. This suit, filed on May 12, 1932, was non-suited by motion of the Trust Company on April 16, 1934, (Tr. 1; 50).

There have been three jury trials of Cleary's suit in the Municipal Court of Chicago. In the first, there was on June 29, 1934 a verdict of \$150,844.50. (Tr. 51); in the second on February 19, 1940, a verdict of \$110,000 (Tr. 99); and in the third on February 20, 1946, a verdict of \$209,000, (Tr. 170).

In the first case the trial judge entered judgment for the Trust Company, notwithstanding the verdict. Cleary appealed to the Appellate Court, which reversed the judgment and ordered the cause remanded for further trial, (*Chicago Title and Trust Company v. Cleary*, 286 Ill. App. 97 (1936)).

In the second case an appeal was taken by the Trust Company; the judgment of the Municipal Court was reversed for new trial conditioned on the trial court's bas-

ing the trial "on the fact that pages 1 and 3 of the disputed document are carbon copies of pages 1 and 3 of the November 21st agreement", (*Chicago Title and Trust Company v. Cleary*, 319 Ill. App. 83, 90 (1943)). The document at issue was an escrow of November 26, 1927, with an addition of Cleary's rights on page 2, and no changes on pages 1 and 3; and the carbon copies of these pages may have been of either date and identical. The instruction of the Appellate Court was followed, and the trial judge stated to counsel, in the absence of the jury:

"Far be it from me to disagree with the Appellate Court, but assuming for the purpose of the arguments that this Trust Co., in order to save the time of their stenographers, used pages one and—carbon copies of pages one and three of the escrow agreement of November 21st and inserted page two, how in the world could the customer, could the escrowee or the—how could Cleary or anybody else prove that they did exactly that." (Tr. 913).

In the third case an appeal was taken to the Appellate Court by the Trust Company, and the judgment was reversed without remandment for further trial. The opinion in this case was rendered on May 26, 1948 and was reserved from publication, but appears in full in the third volume of the Transcript. The officially filed abstract says that the "evidence required conclusion as matter of law that defendant (Cleary) knew of delivery of bonds and by his conduct ratified delivery," (*Chicago Title and Trust Company v. Cleary*, 334 Ill. App. 397 (1948)).

In its third opinion the Appellate Court abandoned all consideration of alleged invalidity of the altered escrow of November 26, 1927, specifically defining Cleary's now admitted rights. The opinion relies completely upon the claim that evidence of Cleary's activity and relationship

as to other matters in the transaction must establish that "reasonable men would come to no other conclusion than that Cleary must have known of and approved the delivery of the bonds even if he did not know precisely when delivery was to be made."

The opinion that Cleary by other transactions consented to the probable loss of his investment through delivery of the bonds by the Trust Company is not in accord with the undenied fact that Cleary served a notice upon the Trust Company ordering that the bonds be held, when he heard that they were likely to be delivered. (Tr. 987-988; 361; 370; 390-391).

Cleary applied to the Appellate Court for Leave to Appeal to the Supreme Court of Illinois on the Ground of Importance, and this motion was denied, (Tr. 1171-1178).

Cleary later sought by writ of error to obtain a review of the Appellate Court by the Supreme Court of Illinois, but a motion by the Trust Company to dismiss writ of error was sustained by the Supreme Court of Illinois on September 15, 1948, and a motion by Cleary for reconsideration of the order dismissing writ of error was denied on September 22, 1948. This will receive full later consideration.

The Appellate Court of Illinois is an intermediate court of review, which does not consider constitutional issues unless they arise in that court. This limit upon jurisdiction is recognized by this Court. *Parker v. Illinois*, 333 U. S. 571; 68 S. Ct. 708 (1948). The Appellate Court for the First District has three divisions of three judges each, the additional one being termed branches by statute; and the First Division has authority to assign cases (Ill. Revised Statutes, Ch. 37, Sec. 45).

The present case was assigned to the Third Division, which also had the case assigned to it on the first and second appeals. Two judges who were members at the time of the second appeal were also members at the time of assignment for the third appeal. At the second appeal one of these members had expressed himself that Cleary had no case, and that the case should be dismissed.

On Cleary's behalf a verified motion was made for re-assignment of the case. This was opposed by the Trust Company on the ground that:

"Two members of the Third Division are already familiar with the facts in this case and its history in the courts. It would unduly burden the judges of another division to require them to become familiar with the complexities and long history of this case and would also increase the labors of counsel in presenting the issues." (Tr. 1167; 1169).

The motion for reassignment was denied, (Tr. 1170), although it was possible for the court to make such a re-assignment. The opinion in the third appeal was written by the member of the Court who had written the opinion in the second appeal—the second appeal dealing with the character of the type-written escrow; the third abandoning this issue and that as to forgery of page 2 of the escrow in favor of one recognizing the escrow and finding that Cleary had authorized the delivery of the bonds.

Cleary's motion necessarily raised the question of re-assignment in the Appellate Court for the first time. That the refusal to make the reassignment violated due process of law under the Fourteenth Amendment was stated to the Appellate Court in an application to that court for leave to appeal to the Illinois Supreme Court on the ground of importance (Tr. 1176); and the violation of due process of law is asserted in the assignment of errors presented

to the Supreme Court of Illinois in the presentation of a writ of error to that Court (Tr. 1179).

This is the issue upon which certiorari is sought in this Court.

This Court Has Jurisdiction.

The issue of due process of law under the Fourteenth Amendment presents itself in this case with respect to a motion presented to the Illinois Appellate Court that the case be reassigned to a division of that Court whose members had not previously participated or established their views in the case. The Appellate Court refused to make a reassignment, and the Supreme Court of Illinois dismissed a writ of error sought by Cleary to determine both federal and state issues of the case.

The motion for reassignment in the Appellate Court was made on September 19, 1946, and denied September 23, 1946 (Tr. 1167-1170). The opinion of the division of the Appellate Court to which assignment was made is not published but is printed in full in volume 3 of the transcript. An order dismissing Cleary's writ of error was allowed by the Supreme Court of Illinois, on motion of the Trust Company, on September 15, 1948, and a motion for reconsideration of the order was denied on September 22, 1948.

A writ of error was sought by Cleary from the Supreme Court of Illinois. A motion by the Trust Company to dismiss the writ of error was granted. No reason was expressed by the Court, and it is therefore necessary to indicate the reasons that were expressed in the Trust Company's motion. They were: (1) a claim that writ of error

did not apply in this case, and (2) a claim that action was not taken with sufficient promptness. They appear in the third volume of the transcript.

(1) This case is one of a constitutional question arising in an Appellate Court. Where the validity of a statute is involved, the constitution of Illinois authorizes writs of error to the Supreme Court of Illinois. (Constitution of Ill. Art. VI, sec. 11).

In *Hallberg v. Goldblatt Bros.*, 363 Ill. 25 (1936), page 29, the Court said:

"We have also held that the judgment of the Appellate Court on a constitutional question which has been raised there for the first time was subject to review by writ of error in this Court."

This opinion has been cited with approval, or its principle approved, in *Cornell v. Board of Education*, 366 Ill. p. 255; *Cuneo v. City of Chicago*, 372 Ill. p. 476; *Merlo v. Public Service Co.*, 381 Ill. p. 308; and *Goodrich v. Sprague*, 385 Ill. 200 (1944), p. 209.

With respect to the present case, not only did there arise in the Appellate Court both a federal and a state constitutional issue of due process of law in the assignment of the case, but also the issue of a violation of the state constitutional right of trial by jury (Ill. Constitution, Art. II, sec. 5) in that the Appellate Court's opinion resorted to a weighing of evidence which was proper for the jury.

If writ of error as a matter of right does not exist from the state supreme to the Appellate Court when federal constitutional issues arise in the Appellate Court, review by the Illinois Supreme Court in such a case would rest upon the discretion of the Supreme Court of Illinois in granting a petition for leave to appeal; and if the discretion were not exercised (as is most usually the case with

such petitions) the Appellate Court would become the highest court of the state for either appeal or certiorari. This has not been intended by the Supreme Court of Illinois.

The order of the Supreme Court of Illinois dismissing Cleary's writ of error in the present case, or the same principle applied elsewhere, will materially interfere with the bringing of a federal constitutional issue to this Court, if it involved such an issue presenting itself in an intermediate court of review without involving the validity of a statute. In the present case there can be no doubt of the validity of a statute providing for the assignment of cases, but there may be serious problems in the making of assignments.

(2) The claim by the Trust Company that Cleary did not act in time is based upon the fact that the Illinois Civil Practice Act, which came into effect on January 1, 1934, provided by section 75 (Ill. Rev. Stats. Ch. 110, sec. 199) that a petition for leave to appeal be made within 40 days after the judgment of the Appellate Court shall become final, this involving ten additional days for filing a petition for rehearing. This presents again a question as to writ of error.

Shortly before the coming into effect of the Illinois Civil Practice Act, the Supreme Court of Illinois adopted rules to come into effect at the same time. Rule 62 reads as follows:

"The process on a writ of error shall be a scire facias to hear errors, issued on the application of the plaintiff in error to the Clerk upon the filing of the transcript of record, directed to the sheriff or other officer of the proper county, commanding him to summon the defendant in error to appear in court and show cause, if any he have, why the judgment or decree mentioned in the writ of error should not be reversed. If the

scire facias benot returned executed, successive writs may issue without an order of court. If the application for the scire facias shall be made on or before 20 days before the first day of the succeeding term of the court, then the scire facias shall be made returnable on the first day of such succeeding term; but if the application is made less than 20 days before the first day of the succeeding term, then the scire facias shall be made returnable on the first day of the second succeeding term."

Scire facias, accompanied by filing of the transcript of record, initiates the proceeding. Transcript of record was filed July 20, 1948 scire facias was issued on that day, was served promptly, and was filed with the Clerk of the Illinois Supreme Court on July 29, 1948. The succeeding term of that Court began on September 13, 1948. Copies of the abstract of record were served upon the Trust Company, and were filed with the Supreme Court on August 20, 1948, as were the briefs and arguments on August 21, because Rule 41 requires filing 20 days before the beginning of the next term, if the case may be taken for that term.

The Supreme Court of Illinois having given no reason for its action, and no reasons having been established by the Trust Company's motion, its action should be regarded as a final judgment "rendered by the highest court of a state in which a decision could be had," (Title 28, United States Code, sec. 257). Otherwise it may be regarded as a judgment of the Appellate Court held by the state Supreme Court to be the highest court in which a decision could be had. In either case certiorari may issue to the Illinois Supreme Court, for its action is involved.

The action of the Appellate Court in refusing reassignment of the case is violative of due process of law under the Fourteenth Amendment. This violation is sustained by

the Supreme Court of Illinois whose order denied review without regard to the rules and principles established by that Court, and whose assumption of discretion under the conditions of this case would prevent the appeal of the issue to this Court.

The order of the Supreme Court of Illinois dismissing petitioner's writ of error was entered on September 15, 1948; and a motion by petitioner for reconsideration of the order was denied by that court on September 22, 1948.

The Question Presented.

The only question presented to this Court is that as to whether due process of law under the Fourteenth Amendment is violated by the refusal of an intermediate state court of review to reassign a case to a division of that court whose members had not previously participated or established their views in the case.

Reasons Relied On For Allowance Of Writ.

A substantial federal question presents itself with respect to a constitutional duty of a state court to assign to the determination of a case members who had not already participated in or established their views in the case, such members being available for such assignment.

Respectfully submitted,

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**BRIEF IN SUPPORT OF PETITION FOR
WRIT OF CERTIORARI.**

The Opinions Below.

With respect to the third review of the case, which is here at issue, there are no officially published reports. The opinion of the Appellate Court is printed in full in volume 3 of the Transcript. An official summary in several lines, with a statement that the opinion is not to be published in full, is found in 334 Ill. App. 397.

No statements were made by the Supreme Court of Illinois with respect to its allowing of the Trust Company's motion to dismiss Cleary's writ of error nor with respect to its denial of the motion for reconsideration of the order.

With respect to the motion for reassignment of the case to another division of the Appellate Court in the third review here at issue, the case of *Chicago Title and Trust Company v. Cleary*, 319 Ill. App. 83 (1943) on second review is of importance.

Jurisdiction.

Due process of law under the Fourteenth Amendment is involved in the refusal of an intermediate state court of review to reassign a case to a division of that court whose members had not previously participated or established their views in the case. This Court has considered no case of this character, in which other divisions of such a court were available for such assignment, and a motion was made for reassignment.

The jurisdiction of this Court is invoked under Title 28, United States Code, section 1257.

The order of the Supreme Court of Illinois to dismiss Cleary's writ of error in that Court was entered on September 15, 1948, and a motion for reconsideration of that order (in the nature of a petition for rehearing) was denied on September 22, 1948. With reference to these matters no statements of opinion or of reasons therefor were made by the Supreme Court of Illinois.

STATEMENT OF THE CASE.

This case does not involve issues of fact except as such facts relate to a refusal to reassign a case on review, where a reassignment was easily possible, and those to whom the reassignment might be made would have had no previous established views or contact with the case. The action involved is that of the Appellate Court for the Third Division of Illinois (Tr. 1167-1170), which denied a motion for reassignment; and the dismissal by the Supreme Court of Illinois of a writ of error sought from that Court to determine the validity of a refusal to reassign the case under the circumstances here indicated.

Errors Relied Upon.

Petitioner assigns as error and as violative of the Fourteenth Amendment the refusal to reassign a case to judges who were available and who had not previously participated or established their views in the case, such reassignment having been asked by petitioner (Tr. 1167); the reassignment having been refused by the Illinois Appellate Court for the First District, and the action of the Appellate Court having in fact been approved by the Supreme Court of Illinois by its entry of an order dismissing writ of error to the Appellate Court involving the validity under the Fourteenth Amendment of such refusal of reassignment.

ARGUMENT.

Due process of law under the Fourteenth Amendment requires the reassignment of a case when judges have previously participated or established their views in a case; other judges are available; and a motion is made for such reassignment.

In opposing a reassignment the Trust Company correctly says that: "Two members of the Third Division are already familiar with the facts in this case and its history in the courts", (Tr. 1169). One member who was the presiding justice at the time of the second review made a statement in the previous review of this case, which is found in the case of *Chicago Title and Trust Company v. Cleary*, 319 Ill. App. 83 (Opinion filed May 5, 1943). Dissenting in part, he said:

"In my opinion Mr. Cleary has not made out a case and judgment should be entered for the Chicago Title and Trust Company. He does not have a cause of action and further time and money should not be consumed in fruitless litigation."

In that case a judgment in favor of Cleary was reversed and remanded, the reversal being on the ground that there was uncertainty as to whether pages 1 and 3 of the disputed escrow of November 26, 1927, were carbon copies of pages 1 and 3 of the November 21 escrow, although page 2 was really the part of the escrow in litigation. On the third retrial, the judgment of the trial court, based on a jury verdict, is based on substantially the same evidence, and involves the same issues. This is substantially the

view expressed by the Trust Company, and quoted above.

In accordance with an established policy, the *Cleary* case was for the third time assigned to the Third Division of the Appellate Court on September 12, 1946. On his behalf a motion was made to reassign the case. The motion was denied (Tr. 1167-1170).

The opinion of the Appellate Court in the second appeal was based on the escrow, and remanded the case for new trial on the ground that there was confusion as to the time when the carbon copy of page 2 of the escrow was made, although the contents of page 2 were not in contest (319 Ill. App. 83). The opinion on the third appeal, here at issue, was not officially published but is fully printed in volume 3 of the Transcript. The issue as to the escrow having been met in the third trial, although it has no substantial relevancy, the Appellate Court, on third appeal, abandoned reliance upon the escrow, and adopted the view previously expressed by one of its members that judgment should be for the Trust Company without further trial, basing this view on the ground that Cleary had voluntarily authorized the delivery of his \$100,000 in bonds, such delivery occasioning his loss.

In conclusion the opinion in the third appeal said:

"We believe that upon the evidence on this issue, reasonable men would come to no other conclusion than that Cleary must have known of and approved the delivery of the bonds even if he did not know precisely when delivery was to be made. We believe, therefore, that the trial court should have taken the case from the jury."

This belief may have been affected by previous familiarity with the case but it was not affected by the fact that on November 28, 1927, Cleary served on the Trust Com-

pany a notice that it was not to deliver the bonds (Tr. 987; 361; 370; 390-391; 582); and that the Trust Company delivered the bonds on November 30, 1927 (Tr. 980).

The constitution of Illinois in providing for the creation of Appellate Courts requires that "No judge shall sit in review upon cases decided by him," (Constitution, Art. VI, section 11). In Illinois, Appellate Courts are held by judges of the circuit court, and the constitutional restriction is primarily intended to forbid hearing on appeal by a judge who tried the case below; but the present case involves the hearing and determination of "an appeal from the decision of a case or issue tried by him." The principle is one supported by the constitution of Illinois and by the Fourteenth Amendment.

Title 28, United States Code, section 47, provides that: "No judge shall hear or determine an appeal from the decision of a case or issue tried by him." A disability equally or more important is presented with respect to a judge who by participation in a prior review has reached definite conclusions, and in a case where other divisions of the reviewing court are readily available.

In *Provident Savings Life Insurance Society v. King*, 216 Ill. 416 (1905) P. 418, Mr. Chief Justice Cartwright quoted the above provision of the constitution of Illinois, and said:

"In 1897 the Branch Appellate Court for the First District was constituted, to which the Appellate Court of that district may assign cases for hearing and decision. It is manifest that the constitution and law contemplate a review by a court consisting of three justices wherever it is possible, and in the First District there may be such a review in every case. The discretion committed to the Appellate Court should be exercised in accordance with the intent of the law and

in the interest of parties, so that they may have the benefit of the judgment of three justices and not be concluded as to the facts without a decision upon them."

This statement specifically applies to a judge who is disqualified by having decided a case in the trial court. But the principle which it states equally applies to a judge who disqualifies himself by having reached a conclusion in hearing a case on review. The statement recently made by Mr. Justice Thompson in *Holmstedt v. Holmstedt*, 383 Ill. 290 (1943), pp. 294-295, applies to the present case:

"It was the duty of the court as soon as he discerned within his own mind any feeling of opposition to a pronounced public policy of the State which might prejudice him for or against either party to the litigation, promptly and of his own motion, to disqualify himself and have the case reassigned."

"This court has said that the spirit of our laws demands that every case shall be fairly and impartially tried, and no judge should think of presiding in a case in which his good faith in so doing is open to such serious question as that presented by this record (*People v. Scott*, 326 Ill. 327)."

The Appellate Court of the First District having made the assignment of the case to the Third Division, and having refused to make a reassignment, the error is one of the Appellate Court and not one of the judge who was required to serve in that Division.

In the case of *Leonard v. Willcox*, 101 Vt. 195 (1928), p. 219, the Court said:

"A litigant ought not to be compelled to submit to a judge who has already confessedly prejudiced himself, and who is candid enough to announce his decision in advance, and his serious doubt that he would do otherwise and adhere to it, no matter what the evidence might be."

In *King v. Grace*, 293 Mass. 244 (1836) the Supreme Judicial Court of Massachusetts speaks in high praise of Article 29 of the State's Declaration of Rights, which announces that:

“It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will permit.”

This Court said in *Mooney v. Holohan*, 294 U. S. 103 (1935), 112, with respect to the application of due process:

“That requirement, in safeguarding the liberty of the citizen against deprivation through the action of the State, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions.”

The present case is not like *Tumey v. Ohio*, 273 U. S. 510 (1927) in which a judge was to receive compensation only by means of convicting accused parties. Here there was a possibility of established views, and there were others to whom the assignment could be made; and here also was a motion for reassignment.

The United States Code, Title 28, section 144, provides:

“Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.”

Under this statute another judge is available, as were other judges in the present case, and the development of some prejudice or of some favoritism is characteristic of humans.

In the recent case of *Dotson v. Burchett*, 301 Ky., 28, 190 S. W. 2d 697; 162 A. L. R. 636 (1945), the court properly said that any doubt of qualification "should be resolved in favor of a party questioning it, bona fide, and upon grounds having substance and significance." This standard was not met on behalf of Cleary.

Respectfully submitted,

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